From: Jim Rosenthal
Sent: Monday, August 05, 2013 11:05 AM
To: Patrick.Halley@fcc.gov; 'rodney.mcdonald@fcc.gov'; Tim.Stelzig@fcc.gov
Cc: hfeld@publicknowledge.org; Jodie@publicknowledge.org; 'Keith.Gordon@ag.ny.gov'; peter.mcgowan@dps.ny.gov; Brian.Ossias@dps.ny.gov; michael.rowley@dps.ny.gov; Salway, David (dsalway@esd.ny.gov); sean.lev@fcc.gov; Marlene.Dortch@fcc.gov; 'Stephanie.Weiner@fcc.gov'; 'Jessica.Rosenworcel@fcc.gov'; 'Mignon.Clyburn@fcc.gov'; 'Nicholas.degani@fcc.gov'; 'julie.veach@fcc.gov'; 'garry.brown@dps.ny.gov'; 'patricia.acampora@dps.ny.gov'; 'james.larocca@dps.ny.gov'; 'gregg.sayre@dps.ny.gov'; 'geraldine.taylor@fcc.gov'; 'Ajit.Pai@fcc.gov'; 'rebekah.goodheart@fcc.gov'; 'Priscilla.Argeris@fcc.gov'
Subject: Unfair Advantage Afforded Verizon in Proceedings WC #13-150. Ex Parte Meeting for Verizon Officails Granted by FCC Officials After Public Comment Period Deadline
Importance: High

Unfair Advantage Afforded Verizon in Proceedings WC #13-150. Ex Parte Meeting for Verizon Officials Granted by FCC Officials After Public Comment Period Deadline

Re:
In the Matter of Application of Verizon New Jersey Inc. and Verizon New York Inc. To Discontinue Domestic Telecommunications Services, WC 13-150.

Dear Patrick, Rodney and Tim:

Since Comments on this application -- 13-150 --had to be filed with the Commission on or before **July 29, 2013 (**Public Input Sought on Verizon Services Affected by Hurricane Sandy (6)**,** why was Verizon granted an ex-parte meeting with the FCC on July 31, 2013 (see: View (2),?

> On July 31, William H. Johnson, Katharine R. Saunders, and I (Maggie McCready) met with Bill Dever, Tim Stelzig, Rodney McDonald, and Jamie Susskind of the Wireline Competition Bureau and Patrick Halley of the Office of Legislative Affairs. The purpose of the meeting was to discuss Public Knowledge's July 22, 2013, Motion to Remove Verizon New York Inc. and Verizon New Jersey Inc.'s ("Verizon") pending application from the normal timeline in the above referenced proceeding.

(See Public Knowledge's July 22, 2013's FCC filing, here: http://apps.fcc.gov/ecfs/document/view?id=7520932608 and ex parte memorandum, here: http://apps.fcc.gov/ecfs/document/view?id=7520932543)

If the FCC Public Comment period ended on July 29, 2013, granting Verizon an additional opportunity to lobby its case with the FCC provides them an unfair advantage, and is not in keeping with the spirit – if not letter – of FCC rules and procedures.

As you recall, the purpose of the meeting was to discuss Public Knowledge's July 22, 2013, Motion to Remove Verizon New York Inc. and Verizon New Jersey Inc.'s ("Verizon") pending application from the normal timeline in the proceeding " In the Matter of Application of Verizon New Jersey Inc. and Verizon New York Inc. To Discontinue Domestic Telecommunications Services, WC 13-150."

This was the second time that Verizon lobbied the FCC to reject Public Knowledge's request to suspend the normal timeline for consideration of this limited discontinuance request. (Verizon New York Inc. and Verizon New Jersey Inc., *Opposition to Public Knowledge's Motion to Remove Application*, In re Section 63.71 Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Services, WC Docket No. 13-150 (July 24, 2013)/ http://apps.fcc.gov/ecfs/document/view?id=7520933287)

I am very concerned that this meeting unfairly advances the agenda of Verizon at the expense of those who oppose the Application, or seek a delay on an FCC decision subject to further investigation and analysis – and generally tilts the balance of equity and fairness toward the Applicant, Verizon.

Moreover, it appears that Verizon did not follow FCC ex parte rules governing permit-but-disclose proceedings made **after** the Public Comment Period per §1.1206 Permit-but-disclose proceedings.

First: "The memorandum shall identify plainly on the first page the specific exemption in § 1.1203(a) on which the presenter relies."

Second, the memorandum "shall be filed no later than the next business day following the presentation." The ex parte meeting was held on July 1, 2013 and the Memorandum was drafted on August 2, 2013.

.

CODE OF FEDERAL REGULATIONS TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART H. EX PARTE COMMUNICATIONS
NON–RESTRICTED PROCEEDINGS

§ 1.1206 Permit-but-disclose proceedings.

(v) Filing dates during the Sunshine Period. If an ex parte presentation is made pursuant to an exception to the Sunshine period prohibition, the written ex parte presentation or memorandum summarizing an oral ex parte presentation required under this paragraph shall be submitted by the end of the same business day on which the ex parte presentation was made. The memorandum shall identify plainly on the first page the specific exemption in § 1.1203(a) on which the presenter relies, and shall also state the date and time at which any oral ex parte presentation was made. Written replies to permissible ex parte presentations made pursuant to an exception to the Sunshine period prohibition, if any, shall be filed no later than the next business day following the presentation, and shall be limited in scope to the specific issues and information presented in the ex parte filing to which they respond.

Please explain why this happened – and what how the FCC intends to address or remedy, accordingly.

Sincerely,

Jim Rosenthal
Resident, Fire Island
Town of Islip, New York
(917) 362-9491
jrosenthal@mintzgroup.com

Here is a copy of the Ex Parte Memorandum written by Verizon on August 2, 2013, following a July 31, 2013 meeting with FCC officials

Maggie McCready
Vice President
Federal Regulatory Affairs

August 2, 2013

1300 I Street, NW, Suite 400 Wes
Washington, DC 20005

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW Washington, DC 20554

Phone 202 515-2543
Fax 202 336-7922 maggie.m.mccready@verizon.co

Re: In the Matter of Application of Verizon New Jersey Inc. and Verizon New York Inc. To Discontinue Domestic Telecommunications Services, WC 13-150

Dear Ms. Dortch:

On July 31, William H. Johnson, Katharine R. Saunders, and I met with Bill Dever, Tim Stelzig, Rodney McDonald, and Jamie Susskind of the Wireline Competition Bureau and Patrick Halley of the Office of Legislative Affairs. The purpose of the meeting was to discuss Public Knowledge's July 22, 2013, Motion to Remove[1] Verizon New York Inc. and Verizon New Jersey Inc.'s ("Verizon") pending application from the normal timeline in the above referenced proceeding.

We explained that, as discussed in Verizon's Opposition,[2] the Commission should reject Public Knowledge's request to suspend the normal timeline for consideration of this limited discontinuance request. Despite Public Knowledge's attempts to advance its views on the broader technology transition, this proceeding addresses only the narrow discontinuance sought under the unique circumstances wrought by Superstorm Sandy in small portions of New York's Fire Island and New Jersey's Barrier Islands. There, where the storm devastated much of Verizon's copper facilities in these areas, the specific local needs and ongoing risk of future storms meant that the Voice Link device was the best solution for quickly and reliably restoring voice service or for providing service in the future should the last remaining copper fail.

---

[1] Public Knowledge, *Motion to Remove Application to Discontinue Domestic Telecommunications Services From Streamlined Authorization*, In re Section 63.71 Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Services, WC Docket No. 13-150 (July 22, 2013).

[2] Verizon New York Inc. and Verizon New Jersey Inc., *Opposition to Public Knowledge's Motion to Remove Application*, In re Section 63.71 Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Services, WC Docket No. 13-150 (July 24, 2013).

We also explained that adhering to the ordinary timeline in this proceeding would not interfere with or prejudice state reviews. Because the FCC considers only interstate telecommunications services, any action it might take here does not address or limit the ability of state commissions to consider issues relating to intrastate services. Additionally, we discussed the timing of any potential additional information requests from the Commission in connection with the pending 214 filing, as well as related issues concerning timing and the need to protect commercially sensitive or otherwise confidential information.

Maggi McCready

Please contact me if you have any questions or need additional information.

Sincerely,

cc: Patrick Halley
Bill Dever Tim
Stelzig Rodney
McDonald Jamie
Susskind

From: Jim Rosenthal
Sent: Monday, August 05, 2013 4:00 PM
To: 'Patrick.Halley@fcc.gov'; 'rodney.mcdonald@fcc.gov'; 'Tim.Stelzig@fcc.gov'
Cc: 'hfeld@publicknowledge.org'; 'Jodie@publicknowledge.org'; 'Keith.Gordon@ag.ny.gov'; 'peter.mcgowan@dps.ny.gov'; 'Brian.Ossias@dps.ny.gov'; 'michael.rowley@dps.ny.gov'; 'Salway, David (dsalway@esd.ny.gov)'; 'sean.lev@fcc.gov'; 'Marlene.Dortch@fcc.gov'; 'Stephanie.Weiner@fcc.gov'; 'Jessica.Rosenworcel@fcc.gov'; 'Mignon.Clyburn@fcc.gov'; 'Nicholas.degani@fcc.gov'; 'julie.veach@fcc.gov'; 'garry.brown@dps.ny.gov'; 'patricia.acampora@dps.ny.gov'; 'james.larocca@dps.ny.gov'; 'gregg.sayre@dps.ny.gov'; 'geraldine.taylor@fcc.gov'; 'Ajit.Pai@fcc.gov'; 'rebekah.goodheart@fcc.gov'; 'Priscilla.Argeris@fcc.gov'
Subject: RE: Unfair Advantage Afforded Verizon in Proceedings WC #13-150. Ex Parte Meeting for Verizon Officails Granted by FCC Officials After Public Comment Period Deadline

In my prior email (please see note, above, with hyperlinks provided) I noted that granting Verizon an ex parte meeting after the Public Comment Period deadline made it impossible for stakeholders to provide any meaningful response to these last minute submissions. Recent Congressional hearings on FCC

Reform have argued that the FCC cannot "rely, in any order, decision, report, or action, on …an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing, in accordance with procedures to be established by the Commission by rule."

Notice and comment rulemaking procedures obligate the FCC to respond to all significant comments, for "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Alabama Power Co. v. Costle,* 636 F.2d 323, 384 (D.C.Cir.1979) (quoting *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 (D.C.Cir.1977)). In determining whether a particular issue is significant, this court has emphasized that "the `arbitrary and capricious' standard of review must be kept in mind." *Home Box Office,* 567 F.2d at 35 n. 58 .

In *NAACP v. FCC,* 682 F.2d 993, 997-98 (D.C.Cir.1982), the court summarized the basic framework for making this determination in the context of an agency rulemaking:

> [The] agency action is presumed to be valid in the absence of a substantial showing to the contrary. The court's review is not merely a summary endorsement, however, but should be searching and careful. While the level of review is not to be perfunctory it is relatively narrow and designed only to ensure that the agency's decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors. This includes the agency's addressing the significant comments made in the rulemaking proceeding.... [W]e will demand that the Commission consider reasonably obvious alternative ... rules, and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review.

In an attempt to clean up some loose ends in its rules, the Federal Communications Commission (FCC or Commission) issued a Notice of Proposed Rulemaking (NPRM) proposing various changes to its procedural rules for ex parte meeting with FCC staff after the Public Comment Period deadline. (Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, Notice of Proposed Rulemaking, GC Docket No. 10-44, rel. Feb. 22, 2010 (NPRM). (See: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-31A1.pdf)

The proposals were intended to increase efficiency and modernize FCC procedures, enhance the openness and transparency of Commission proceedings, and clarify certain procedural rules.

The Administrative Procedure Act (APA) defines "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter." 5 U.S.C. § 551(14).Consistent with that definition, the Commission's rules define an *ex parte* presentation as "[a]ny presentation which: (1) If written, is not served on the parties to the proceeding; or (2) If oral, is made without advance notice to the parties and without opportunity for them to be present," with "presentation" defined as "[a] communication directed to the merits or outcome of a proceeding, including any attachments to a written communication or documents shown in connection with an oral presentation directed to the merits or outcome of a proceeding." Written *ex parte* presentations include, for example, data, memoranda making legal arguments, materials shown to or given to Commission staff during *ex parte* meetings, and email communications to Commission staff directed to the merits or outcome of a proceeding. Oral *ex parte* presentations include, for example, meetings or telephone or relay calls with Commission staff where parties present information or arguments directed to the outcome of a proceeding. The definition excludes certain types of communications, such as status inquiries that do not state or imply a view on the merits or outcome of the proceeding. 47 C.F.R. § 1.1202(a), (b).

In permit-but-disclose proceedings, our *ex parte* rules require just this documentation. (47 C.F.R. § 1.1200 *et seq.)*

FCC Proposed Changes to Ex Parte Lobbying Rules

On Feb. 22, 2010, the Federal Communications Commission (FCC) released the text of its Notice of Proposed Rulemaking (NPRM) to revise certain of its regulations governing ex parte presentations to Commissioners and staff. The proposed rule changes expanded on existing disclosure requirements for meetings with the FCC, as part of broad agency reform toward transparency and greater public participation.

According to the FCC:

> "We believe that information gathered through such permitted presentations can be important to the Commission's ability to reach the best possible decisions on proposed orders subject to a Sunshine period restriction. Nonetheless, the exception could be abused to shore up the record on one side of an argument without allowing responses on the other side." .(Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, Notice of Proposed Rulemaking, GC Docket No. 10-44, rel. Feb. 22, 2010 (NPRM). (See: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-31A1.pdf on page 10.)

Areas of proposed change or further inquiry included lobbying disclosure obligations, and restrictions on lobbying immediately prior to Commission votes.

Sunshine Period changes

The current *ex parte* rules prohibit most presentations, whether *ex parte* or not, during the Sunshine period, which begins when a proposed order is placed on a Sunshine notice and ends when the text of a decision is released or the draft returned to the staff.(*See* 47 C.F.R. § 1.1203 (The Sunshine period prohibition "applies from the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission: (1) Releases the text of a decision or order related to the matter; (2) Issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) Issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first."). Typically, the Sunshine notice is released seven days before an agenda meeting.(*See* 5 U.S.C. § 552b(e)(1). The Sunshine period prohibition is intended to provide decision-makers "a 'period of repose' during which they can be assured that they will be free from last minute interruptions and other external pressures, thereby promoting an atmosphere of calm deliberation." (*See Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3020, para. 72 (1987). The prohibition on most presentations during the Sunshine period is also meant to give the Commissioners and staff time to examine a record that is largely fixed, rather than continuing to analyze new data and arguments. We believe that a period of repose from both oral and written presentations before a Commission meeting continues to make sense in most circumstances.

Exceptions to the Sunshine period prohibition include presentations "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement." *(See* 47 C.F.R. §§ 1.1203(a)(1); 1.1204(a)(10).) However, the the ex parte memorandum must also identify plainly on the first page the specific exception in § 1.1203(a) on which the presenter relies.

In theory, the period immediately preceding an FCC vote or decision is meant to be a time for decision makers to reflect on comments filed in a docket without further public input. In practice, some "permitted" ex parte meetings occur during this Sunshine Period, most commonly at the request of the FCC to clarify arguments or shape the record. In order to prevent the appearance of secret deal making, the NPRM proposed to require parties to file notices electronically within four hours after such permitted Sunshine Period meetings occur. Under the proposal, if a permitted ex parte presentation is made during the Sunshine Period, the notice must provide the date and time of the presentation and must state in the first sentence why the meeting was permitted under the rules.

The FCC, on page 9, provided the following language:

> (T)o make it simpler for staff to determine whether the *ex parte* presentation was permissible and whether the notice was timely filed, we propose to require that the notice say in the first sentence why the *ex parte* presentation was permissible, and also on what day and at what time the oral presentation took place. Specifically, we propose the following new language in rule 1.1206(b):
>
> > If the memorandum summarizing an oral presentation required to be submitted under this subpart results from an oral *ex parte* presentation that is made pursuant to an exception to the Sunshine period prohibition, the memorandum shall be submitted through the Commission's electronic comment filing system, and shall be submitted within four hours of the presentation to which it relates. The memorandum shall also identify plainly on the first page the specific exception in § 1.1203(a) on which the presenter relies. The memorandum shall also state the date and time at which the oral *ex parte* presentation was made.

Verizon did not state why the *ex parte* presentation was permissible,

During the last decade, the use of informal rulemaking as a vehicle for the shaping of federal administrative policy has increased sharply. This trend has been accompanied by greater judicial scrutiny, and occasional judicial supplementation, of the informal rulemaking procedure provided by section *553* of the Administrative Procedure Act (APA).The courts have sought, by closer review, to ensure that there will be full public access to and understanding of informal rulemaking proceedings, and that agency decisions will be suitably framed for judicial review.

First, ex parte contacts made after a Public Comment Period deadline may lead to the introduction of evidence that could decisively influence the agency's ultimate decision. Second, the use of ex parte contacts to introduce important evidence after the deadline may eliminate the opportunity for other interested parties to respond. If ex parte contacts, had after the deadline, are used to introduce empirical information or proposals not already on the record, however, they may severely hamper effective judicial review, reduce the political accountability of the agency, and diminish the incentive for public participation in the informal rulemaking process.

So what is the proper role of ex parte contacts in rulemakings governed by section 553 ?

In *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 36 (D.C.Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977), the court, following the trend toward judicial augmentation of section *553* procedures, imposed strict limits on ex parte contacts. Its holding would require that once an agency has issued a notice of proposed rulemaking pursuant to section *553,* ex parte contacts must be avoided; if they occur, they are to be exposed on the public record. In that case, the court also objected to the Commission's ex parte meetings with lobbyists. It expressly declined to draw conclusions about the effect of the meetings upon the agency's decision, noting only that the record was consistent "with often-voiced claims of undue industry influence over Commission proceedings.'" The court pointed, however, to evidence indicating that some industry representatives had expressed their actual positions only in the ex parte meetings, and not on the record. The court noted that these private communications might have provided the basis for the agency's ultimate decision,' and suggested that their absence from the record on appeal violated the requirement, first articulated by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). that a reviewing court must be presented with "the full administrative record that was before [an agency official] at the time he made his decision.' In addition, the court noted that the failure to place the agency's negotiations on the record had denied the court the benefit of an "adversarial discussion among the parties" in the forum below. This, the court suggested, violated the spirit, if not the letter, of recent decisions of the Circuit specifying the procedural safeguards to be observed in informal rulemaking. Finally, the secrecy of the contacts was held inconsistent with "fundamental notions of fairness implicit in due process," and with "the idea of reasoned decision-making on the merits which undergirds all of our administrative law."

The court found support for this last conclusion in an earlier D.C. Circuit decision, *Sangamon Valley Television Corp. v. United States,* 269 F.2d 221 (D.C. Cir. 1959). *Sangamon* involved an FCC informal rulemaking to reassign a television channel. During the proceeding, one of the parties made an off-the-record written submission of certain crucial data to the Commission. The court of appeals found this contact sufficient to vitiate the agency's decision. It remanded with the brief comment that, because the proceeding "involved . . . resolution of conflicting private claims to a valuable privilege," 26 namely the use of a television channel, basic fairness to the parties required that none be permitted ex parte contacts with the government body that was to resolve their competing claims.

The *Home Box Office* court found *Sangamon* controlling because the pay cable proceedings under review similarly involved the "resolution
of conflicting private claims to a valuable privilege." The court, however, did not limit its holding to such proceedings. Relying loosely on the authority of *Sangamon* and on purported expressions of congressional and executive policies disfavoring ex parte contacts, the court argued that the restrictions adopted in *Sangamon* should be imposed as a matter of fairness in all informal rulemakings. (The putative declaration of congressional policy was the Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 STAT. 1241 (Sept. 13, 1976), opening meetings of federal agencies to the public; the executive action was Executive Order 11920, 12 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1040 (1976)) , barring all ex parte contacts with White House staff by those seeking to influence allocation of international air routes. *See* Home Box Office, Inc. v. FCC, slip op. at 95-97.) The court therefore formulated a strict standard to govern ex parte contacts in such proceedings: Once a notice of proposed rulemaking is issued, ex parte contacts dealing with the rulemaking are prohibited; if such contacts occur, all written documents and a written summary of any oral communication must be placed in a public file so that interested parties can respond. Because the court did not have before it the content of those ex parte contacts that may have influenced the decision-making process under review, it remanded the rulemaking record to the FCC with instructions to hold "an evidential hearing to determine the nature and source of all ex parte pleas and other approaches that were made to the Commission or its employees after the issuance of the first notice of proposed rulemaking."

Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C.Cir.1977):

> (A)n agency must comply with the procedures set out in Section 4 of the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 417, 91 S.Ct. 814. The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and "a concise general statement of [the] basis and purpose" of the rules ultimately adopted. 5 U.S.C. § 553(b)-(c). As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule. *See Portland Cement Ass'n v. Ruckelshaus,* 158 U.S.App.D.C. 308, 326-327, 486 F.2d 375, 393-394 (1973), *cert. denied,* 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus,* 155 U.S.App.D.C. 411, 445, 478 F.2d 615, 649 (1973); *Automotive Parts & Accessories Ass'n v. Boyd,* 132 U.S.App.D.C. 200, 208, 407 F.2d 330, 338 (1968). *See also* Wright, *supra,* 59 Cornell L.Rev. at 380-381. To this end there must be an *exchange* of views, information, and criticism between interested persons and the agency. *See Portland Cement Ass'n v. Ruckelshaus, supra,* 158 U.S.App.D.C. at 326-327, 486 F.2d at 393-394; *cf. National Nutritional Foods Ass'n v. Weinberger,* 512 F.2d 688, 701 (2d Cir.), *cert. denied,* 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975). Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based. *Portland Cement Ass'n v. Ruckelshaus, supra,* 158 U.S.App.D.C. at 325-327, 486 F.2d at 392-394; *International Harvester Co. v. Ruckelshaus, supra,* 155 U.S.App.D.C. at 445, 478 F.2d at 649. Moreover, a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points[58] raised by 36*36 the public. *Portland Cement Ass'n v. Ruckelshaus, supra,* 158

U.S.App.D.C. at 326-327, 486 F.2d at 393-394. A response is also mandated by *Overton Park,* which requires a reviewing court to assure itself that all relevant factors have been considered by the agency. *See* 401 U.S. at 416, 91 S.Ct. 814; *accord, Duquesne Light Co. v. EPA,* 522 F.2d 1186, 1196 (3d Cir. 1975), *vacated on other grounds,* 427 U.S. 902, 96 S.Ct. 3185, 49 L.Ed.2d 1196 (1976).

From this survey of the case law emerge two dominant principles. First, an agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible. Second, the "concise and general" statement that must accompany the rules finally promulgated

must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. * * * [The record must] enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Automotive Parts & Accessories Ass'n v. Boyd, supra, 132 U.S.App.D.C. at 208, 407 F.2d at 338; *accord, National Nutritional Foods Ass'n v. Weinberger, supra,* 512 F.2d at 701; *Pillai v. CAB,* 158 U.S.App.D.C. 239, 244-252, 485 F.2d 1018, 1023-1031 (1973); *National Air Carriers Ass'n v. CAB,* 141 U.S.App.D.C. 31, 44-45, 436 F.2d 185, 198-199 (1970); *cf. Camp v. Pitts,* 411 U.S. 138, 142-143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 420, 91 S.Ct. 814.

CODE OF FEDERAL REGULATIONS TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART H. EX PARTE COMMUNICATIONS
NON–RESTRICTED PROCEEDINGS

§ 1.1206 Permit-but-disclose proceedings.

(v) Filing dates during the Sunshine Period. If an ex parte presentation is made pursuant to an exception to the Sunshine period prohibition, the written ex parte presentation or memorandum summarizing an oral ex parte presentation required under this paragraph shall be submitted by the end of the same business day on which the ex parte presentation was made. The memorandum shall identify plainly on the first page the specific exemption in § 1.1203(a) on which the presenter relies, and shall also state the date and time at which any oral ex parte presentation was made. Written replies to permissible ex parte presentations made pursuant to an exception to the Sunshine period prohibition, if any, shall be filed no later than the next business day following the presentation, and shall be limited in scope to the specific issues and information presented in the ex parte filing to which they respond.